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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 259

S. D. TILNEY, W. C. HAM, ET AL.,
Petitioners,

vs.

CITY OF CHICAGO, A VOLUNTARY MUNICIPAL CORPORATION, AND OTHERS, INDIVIDUALLY AND AS TRUSTEES,
Respondents.

Petition for Writ of Certiorari.

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Petition for Writ of Certiorari.

To the Honorable Justices of the Supreme Court of the United States:

Your petitioners, S. D. Tilney, C. N. Boord, W. C. Ham, John S. Ankeney and Howard J. Rolfe, and others in like situation as a class (Tr. 5) pray the issuance of a writ of certiorari to review the decision of the United Circuit Court of Appeals for the Seventh Circuit, rendered April 16, 1943, affirming an order of dismissal of complaint in suit, entered by the District Court of the United States at Chicago on April 6, 1942. A petition for rehearing was promptly filed and denied by said Circuit Court of Appeals on May 14, 1943. The opinion by the Circuit Court of

Appeals is reported in 134 Fed. (2d) at page 682. Timely application for review by this court is made on or before August 12, 1943. The petition is presented in accordance with Section 240 of the Judicial Code as amended and Rule 38 of this Court as amended.

SUMMARY OF THE MATTER INVOLVED.

S. D. Tilney and others filed in United States District Court at Chicago a complaint in civil suit in equity on March 10, 1942 (Tr. 2 to 65). Several Exhibits are attached in support of the complaint (Tr. 65-95). The complaint seeks the restoration and performance of a trust, for the municipalization of street railways in the Chicago area by consumer cooperative financing. That fund accumulated from net residue of fares paid by petitioners, pursuant to the ordinances of the City of Chicago adopted February 11, 1907 and thereafter. Those ordinances and said trust for the benefit of car riders as consumers of street car service were approved and confirmed by decrees entered in the United States District Court at Chicago. Those decrees followed upon mandates sent down by this Supreme Court and by the Court of Appeals for the Seventh Circuit (Tr. 136ff), as part of reorganization proceedings in equity for street railways at Chicago, conducted in that chancery court during the year 1903 and thereafter. Said proceedings were general equity and foreclosure matters. Said decrees were entered pursuant to directions given upon appeals from prior orders, taken before the year 1907 to this Supreme Court and to said Circuit Court of Appeals (Tr. 136ff). Said final decrees and said ordinances and the payment of fares by your petitioners pursuant to the same, are all contractual matters (Tr. 138-140); and are under protection of the bill of rights and constitution, as to the validity of contracts, equal protection of the law and due process of law.

In the District Court upon motion by respondents under Rule 12(b) of the Federal Rules for Civil Procedure to dismiss complaint (Tr. 99), an order of dismissal was entered in the District Court (Tr. 102). Upon an appeal taken by your petitioners, the Circuit Court of Appeals affirmed the order of dismissal and denied the petition for rehearing (Tr. 117, 159). Said petition for rehearing constitutes an assignment of errors for review by this Court (Tr. 119-157). Your Honors are requested to read that petition.

FOREWORD.

At the beginning of this century Street Railways at Chicago and elsewhere in this country were rendering poor service and were falling into court receiverships. In Chicago and many cities there were elections based upon Municipal ownership campaigns. There arose such an election at Chicago. The proponent became Mayor. Then arose the further question of borrowing the money for purchase or accumulating the money from fares before purchase should be made. The latter plan prevailed. The year 1907 ordinances which are basic in this record, embodied that plan. The money has accumulated. The purchase is overdue and has not been made. Predatory interests are blocking any performance of the trust. This proceeding was brought to remedy that situation. The courts below say in effect that those whose contributions of money have aggregated the trust fund, are forbidden to speak at Court. Only those who perverted the trust and wish to waste the resources of the fund, may be heard in courts of the United States. That is the ruling to date of the courts in this case.

STATEMENT OF FACTS.

Synopsis of the Pleading Record.

The plaintiffs filed their original complaint in chancery asking for the restoration and administration of the trust fund provided for by Municipal and court records in the year 1907, and accepted thereafter by your petitioners who are Revenue paying Street Car Riders (Tr. 2-95). Plaintiffs filed also a motion for relief *pendente lite*, seeking discovery, expenses for trial and other preliminary relief. The defendants filed their appearance and motion to dismiss the complaint, asserting lack of jurisdiction upon various grounds (Tr. 98). The suit was dismissed (Tr. 102) and this appeal was taken by the plaintiffs (Tr. 103).

The A-paragraphs of the complaint deal with the parties, the basis for a class suit, the fund and the amount involved in the suit (Tr. 2-6), one hundred million dollars.

The B-paragraphs deal with the trust powers, equities and funds, which establish basic rights of the plaintiffs (Tr. 6-19).

The C-paragraphs of the complaint charge various breaches of trust by the defendants (Tr. 19-45).

The D-paragraphs of the complaint ask for various relief. The Exhibits consist of documentary material to support in detail the charges made by the complaint (Tr. 45-64).

The complaint begins as follows (Tr. 2-3):

"Source of Complaint.

"A-1) The plaintiffs herein are citizens of the United States, and have been and continue from time

to time, to be car rider revenue patrons who have paid, on many days during many years, cash fares upon demand as hereinafter stated, in excess of reasonable and just compensation, for travel services within the City of Chicago, upon each of the transportation systems hereinafter mentioned, which at all times herein concerned, continuously are operating as common carriers within and adjacent to the City of Chicago:

"The Fund.

"A-2) These excess cash fares were paid by plaintiffs only after demand made therefor, by said common carrier systems as an agency for the defendants, as provided by certain primary ordinance trust agreements hereinafter mentioned, before plaintiffs were permitted to have such public service transportation services, and thereby the excess moneys beyond reasonable charges for such transportation, were taken from the plaintiffs, by coercion and force against their wills and without any authority or consideration whatever, other than said trust agreements, but expressly and exclusively to become part of the car-riders-overcharge-trust-fund, to be determined by fixed percentages of all moneys collected, and subject to accounting for said fund, and restoration in equity as herein demanded, and as provided by sovereign constitutions and statutes, which were made for the protection of plaintiffs: all as hereinafter more fully stated:

"Amount in suit is sufficient.

"A-3) The sum of money and value of fund, herein claimed and in controversy, with all interest and costs excluded, exceeds the sum or value of Three Thousand Dollars. Each and all of the plaintiffs named and described at paragraphs A-5 to A-8 in this complaint, have a beneficial interest and indivisible right in equity, vested by said trust agreements since February 1,

1907, to enforce the full performance of the car-riders-overcharge-trust herein mentioned."

Paragraph A-4 states the names and residences of the named plaintiffs who are all non-residents of the State of Illinois. Paragraph A-5 indicates the number of unnamed plaintiffs described as members of the class of revenue paying car-riders. Paragraph A-6 charges that plaintiffs are the sole beneficiaries of the fund. Paragraphs A-7 and A-8 charge the facts to show that this is a class suit. Paragraph A-9 states that the plaintiffs sue the defendants. Paragraph A-10 names the Trustee defendants who are all residents of the State of Illinois (Tr. 3-6).

Paragraph B-1 shows that the trust was declared February 1, 1907. Paragraph B-2 shows that the trust continues in force and Paragraph B-3 shows that the trust is now in operation. Paragraph B-4 states the basic language of the primary trust ordinances. Paragraph B-5 states acts of confirmation. Paragraph B-6 shows the private nature of the trust. Paragraph B-7 shows the names given to the fund. Paragraphs B-8 and B-9 established basic money facts about the trust. Paragraphs B-10 and B-11 show confirmation of the trust by City Council and Corporation Counsel. Paragraph B-12 shows that defendants were warned about trust duties. Paragraph B-13 shows that defendants failed to seek court advice about their trust duties. Paragraph B-14 shows that rights and remedies claimed by the complaint are applicable for the entire period of time mentioned by the complaint. Paragraph B-15 shows that this is an irrevocable express active trust. Paragraph B-16 shows the fiduciary relations. Paragraph B-17 shows that the trust relationship became vested. Paragraph B-18 shows that the trust is guaranteed by the City of Chicago. Paragraph B-19 shows that this trust for plaintiffs is pursuant

to the Constitution. Paragraph B-20 shows that the rights of the plaintiffs and the duties of the defendants are inseparable. Paragraph B-21 shows the amount of the fund in trust. Paragraph B-22 shows that the City Council of Chicago confirms the trust. Paragraph B-23 shows the basic purposes of the trust (Tr. 7-19).

Paragraph C-1 shows that the trust is now in danger. Paragraphs C-2 and C-3 show various wastes of the trust funds. Paragraph C-4 shows that defendants propose to renounce their trust duties. Paragraphs C-5, C-6, C-7, C-8, C-9, C-10, C-11, C-12 and C-13 show various departures from trust duties, wrongful administration and general waste. Paragraphs C-14, C-15, C-16, C-17, C-18, C-19, C-20, C-21, C-22, C-23, and C-24, show the duty of the trustees to make disclosure, their failure to do so, their various acts of fraud, duress and wrongful use of funds so that they are about to be lost. Paragraphs C-25, C-26 and C-27, show that the demands by plaintiffs are not performed; that the defendants are adverse to the trust; and that the defendants are now disqualified to act as trustees. Paragraph C-28 shows failure to seek court advice. Paragraphs C-29 and C-30 show delays in payment by the defendants, and need for court to control the trust. Paragraphs C-31, C-32, C-33, C-34, C-35, and C-36, show that the trust was fully recognized by the City Council, the Mayor of Chicago, and the Alderman, at the time the ordinances were passed in 1907. Paragraphs C-37 to C-41 show that the defendants in various ways have sought to evade and to breach the trust, and to misuse their powers (Tr. 19-45).

Paragraph D-1 asks for summons. Paragraph D-2 makes the jurisdictional statement required by Rule 8 of federal rules of civil procedure. Paragraph D-3 shows that the court has constitutional duties to perform. Paragraph D-4 shows that the trust is based upon the Constitution. Paragraph

D-5 shows that there are peremptory duties under the Constitution. Paragraph D-6 shows the irrevocable duties of the defendants. The remaining D-paragraphs show various grounds for relief, and ask for special sorts of relief (Tr. 46-64).

The E-paragraphs are exhibits consisting of various official documents of the City of Chicago, which have from time to time confirmed this fund to be a trust fund (Tr. 65-95).

Respondents are Voluntary Trustees.

Upon the offer made by their own ordinances, the defendants voluntarily became trustees, to collect the funds in question, with power and duty to invest only in street railways at Chicago.

The complaint states that the City of Chicago is a voluntary municipal corporation (Tr. 6), and that the other defendants as its several officers, are voluntary actors as to this trust property (Tr. 6). The purely voluntary nature of cities, towns and villages, as contrasted with counties, townships, and other administrative units and arms of general government is elementary. The voluntary nature of its government was successfully relied upon by the City of Chicago in the case of *Cook County* v. *City of Chicago*, 311 Ill. 234 at 237. The matter is adequately discussed by that opinion of the Supreme Court of Illinois.

How the trust fund was established.

The complaint shows that for some time before the year 1907 the street railways of Chicago were in receivership and were undergoing reorganization in the Federal Courts at Chicago. As part of that reorganization, separate ordinances for each of several street railway companies were passed by the Council of the City of Chicago.

All of said ordinances became effective as of February 1, 1907, upon acceptance by the several companies at later dates. The basic language of every one of said ordinances is set forth in the complaint (Tr. 8) as follows:

"B-4) The language of said primary ordinances, which establish said car-riders-overcharge-trust and are basic for this complaint, reads in each of said primary ordinances, substantially as follows:

'Division of Remaining Net Receipts.

'After the deduction from the gross receipts of the items hereinbefore in this section provided, the amount remaining shall be considered as the net receipts for the operation of the street railway system hereby authorized, and shall be divided between the Company and the said City in the following proportions: forty-five (45) per cent to be retained by the Company and fifty-five (55) per cent to be paid forthwith by the Company to the said City, crediting thereon all amounts paid out during the preceding year by the Company for license fees, if any, exacted from the Company and employes.

'It is further provided that, subject to the action of the City Council of said City, *the said City shall deposit the amount so paid to the said City to the credit of a separate fund to be kept and used for the purchase and construction of street railways by said city;* but any failure to comply with this provision shall in no way affect the rights or obligations of the Company under this ordinance."

Administration and interpretation as a trust fund.

After February 1, 1907 the defendants have received as said 55% of net operations of street railways, various sums of money from time to time. On January 1, 1937

the defendants by an ordinance of the City of Chicago, admitted that they held in the fund approximately Seventy Million Dollars (Tr. 12). The report of the City comptroller as of January 31, 1941, charges the respondents with more than Seventy-five Million Dollars (Tr. 157). The printed annual reports of said comptroller of the City of Chicago distributed periodically and filed in many financial libraries show this fund as a special fund and among other trust funds for each year from the year 1907 to the present date.

That this fund was held only as a trust fund, is admitted by a great many other official documents promulgated and placed of record by the defendants. Of these, examples are shown by official opinions of many corporation counsellors of the City of Chicago (Tr. 78 to 95), and by the present Corporation Counsel and his assistants (Paragraph B-11, Tr. 13). This is also shown by the wording used in the *proposed* traction ordinance passed in 1930, which failed to become effective by want of acceptance by the Companies. That language appears at Paragraph B-10 of the complaint (Tr. 13). The trust relationship also is shown by many collateral provisions of the 1907 ordinances, which are shown and expressed throughout the complaint and the Exhibits (B-6, Tr. 10 and B-22, Tr. 18 are examples).

The language of the 1907 ordinances quoted above from Paragraph B-4 of the complaint (Tr. 8):

> "It is further provided that, subject to the action of the City Council of said City, the said City shall deposit the amount so paid to the said City to the credit of a separate fund to be kept and used for the purchase and construction of street railways by said City; *but any failure to comply with this provision shall in no way affect the rights or obligations of the Company under this ordinance.*"

shows clearly that the payment of said fund to the City was a complete discharge and acquittance to the street railway companies of their obligation under the ordinances, to the extent that payment has been made, and that their rights and obligations do not include any power to inquire about or to control any disposition of said fund beyond the point of payment of the same to the City.

Municipal ownership by issuance of certificates under the Mueller law (Ill. Rev. Statutes 1941, Chap. 24, Section 65-4ff.) has not been attempted by the City of Chicago (Tr. 41 ff.). The case of *Chicago Ry. Co.* v. *City of Chicago,* 292 Ill. 190, was a litigation to make some application of the same ordinances that are involved in the present case. Present plaintiffs were not parties to that suit. But the Court ruled at page 197:

> "It was intended that the share paid to the City should purchase the property, (Street railways at Chicago) and the City or its licensee would then operate the railways. There was a supplementary unification ordinance (1913, Tr. 9-B5) passed by which the street railways were to be operated as a single system, with the same rate of fare and division of the income."

These 1907 Ordinances Remain Controlling.

It is common knowledge, shown by many public documents, that in the years 1918, 1925, 1930 and in 1941, the City Council of Chicago passed new traction ordinances looking toward reorganization to supersede the 1907 ordinances. (See annual published reports of the Board of Supervising Engineers.) Substantial portions of the 1930 and 1941 ordinances are set forth in this complaint (Tr. 12-13, 21-22 and elsewhere). None of said ordinances have become effective. None of them have

been accepted at any time by any operating Company Each of said ordinances provide that it would not become operative unless and until the operating company named therein should accept and confirm the same. No ordinance or plan to purchase and operate the street railway under said Mueller Law, by issuance of *income* certificates to be similar to water fund certificates, has been tried. Since no later ordinance has yet become operative as to street railways, the 1907 ordinances as amended for joint operation in 1913 (Tr. 9-B5) remain controlling for all purposes of this suit.

By the motion to dismiss (Tr. 98), the defendants admit on this record all the foregoing and other facts shown by the complaint. Appellants submit that the trust fund and trust relationship are not controverted upon the present record.

Bernard Fichter v. *Milk Wagon Drivers Union Local 753,* 382 Ill. 91.

Kerner v. *Thompson,* 293 Ill. App. 454 at 460, 13 N. E. (2d) 110 at 113.

Proof for Petitioners by Verified Complaint.

Petitioners refer Your Honors to the verified complaint and exhibits in this record. By that verification the Court has before it, *admitted proof* of all ordinances and municipal records therein mentioned. (See Ill. Rev. Stats. Chap. 51, Sections 48a, 48b and 18: Chapter 24, Section 7-50.) Those ordinances and municipal records establish a trust for benefit of your petitioners, and an administration of it that has been admitted officially by the defendants, for at least thirty years before the filing of this suit.

ANALYSIS OF ADVERSE OPINION BY CIRCUIT COURT OF APPEALS.

The Ruling That Fund Is Ownerless.

The District Court and the Circuit Court of Appeals base the dismissal orders upon their statement that petitioners have no property interest to enable an application to the court (Tr. 114). They do not say who could raise the question. It stands admitted by the motion to dismiss the complaint, and by the opinion of the Circuit Court of Appeals, that a trust was created, that a fund was established, and that there has been vast and serious wastage of the money (Tr. 99, 115 ff.).

The complaint charges (Tr. 59-D-27), that neither the State of Illinois, nor the Treasurer of Cook County, nor the City of Chicago as a municipality, have any right or power to raise the question. Facts and authorities have been given to establish that that is so. The motion to dismiss admits that that is so. Nothing in the opinion by the Court of Appeals refutes that that is so (Tr. 114 ff.). The net result of the ruling by the District Court, and by the Circuit Court of Appeals, and the net effect of the opinion by the Court of Appeals, arrives at an absurdity. What they say is that this fund of One Hundred Million Dollars is outside the pale of court relief. Anyone can waste or steal this fund with impunity. Such ruling ignores the cases cited below at pages 37 ff. The complete indifference to that situation by the courts now under review, only adds to the tragic seriousness of the utter breakdown in morality and conscience, which is shown throughout this record.

No one has questioned that this record shows a fund dedicated to a specific purpose; namely, a trust fund "to be kept and used for the purchase and construction of street railways" at Chicago. No one has questioned on this record the fact that no part of the fund has been so kept or used. No one has questioned that it is shown by this record that the entire fund has been misappropriated and dissipated. The money has been misused by complete departure to other and different purposes, to benefit wholly new groups of people. By misappropriation purchase of Street Railways has been thwarted and long delay is accomplished. No one has questioned on this record the fact that said waste and dissipation of the fund, and departure in use of the fund, constitute an open defiance to basic laws of property, basic laws governing future interests, the basic principles of trust relationships, and the plain dictates of conscience and common honesty at all times and everywhere. These by-passed bases of law are the very foundation of modern courts of equity.

Highways Not Rentable in Illinois. No Street Rental and No City Compensation Became Part of this Trust.

The opinion by the Court of Appeals (Tr. 115) ignores wholly the pleading by petitioners (Tr. 54-55 and 123 K and 142-146), which establishes that this is a private fund and is not a taxpayer fund. That pleading by petitioners stands uncontested on this record by any pleading or defense. When for the first time after thirty-five years assurance that this is a trust fund (Tr. 65-95), petitioners are told that the City may suddenly reverse its position and boldly declare that it holds the money as street rental, we submit that petitioners have shown right to hearing on the merits. We submit further that the fund could not arise as street rental, because in Illinois public streets cannot be rented to anyone for any purpose at any time (337 Ill. 200: Tr. 10, 145).

The City as a municipality gave no consideration for the 55% fund. The 55% arose after deducting many charges, *"crediting thereon all amounts paid out during the preceding year by the Company for license fees, if any, exacted from the Company or its employes."* Vast deductions were made under this language before the residuary 55% arose. Those deductions are shown by the official report of the Board of Operations as of January 31, 1941 (Tr. 11 and 65 to 78). Those deductions included not only license fees, but many other municipal claims and charges.

Petitioners Seek Street Railway Service.

The statement in the opinion by the Circuit Court of Appeals (Tr. 115) that petitioners seek distribution to them out of the fund is not so. The complaint asks only for restoration of the fund and application of the fund to the purpose stated in the 1907 Ordinances (Tr. 64-0). Namely for Municipalization through consumer financing. The court should keep in mind at all times that the fares were placed at five cents in the year 1907, instead of three cents, for the definite purpose of assembling the fund to purchase the street railway system (Tr. 40 ff.) The (I.M.O.) Immediate Municipal Ownership campaign, to be financed by the issuance of Mueller income certificates, was defeated; in favor of the slogan "get the money first" which was urged by those who advocated (E.M.O.) Eventual Municipal Ownership, by car-rider-consumer financing. The payments made in advance for thirty-six years by the revenue patrons (your petitioners) have more than paid for the Street Railway Systems at Chicago. Your petitioners are vested with all rights to have that better and improved transportation service for which this record shows they have fully and generously paid in advance.

There could not be any ruling by Illinois Commerce Commission adverse to property rights of your petitioners.

By seeking to inject the Illinois Commerce Commission into the case, the defendants and the Court of Appeals take the position that the fares were fixed by the Commission and that the entire fare went to the street car companies as owners and that they as such owners then turned 55% of the net earnings over to the City. That position does not accord with the facts. That assumption is rank misconception. The 55% never did belong to street car companies, unless they held it as trustees. By the 1907 Ordinances which they accepted, their earnings were impressed with the trust at the moment that the riders parted with their money. When that net portion of the fare, whatever the fare may be, has been turned over to the City, it is provided that it must be "kept and used for the purchase and construction of Street Railways."

Furthermore, the Commerce Commission did not tamper nor interfere with this car-rider consumer fund in any way. They did not change it nor attempt the slightest control over it. They accepted it as a deduction to be made by the Companies from net earnings. The car riders had no reason whatever to intervene. The fund was left intact as created. The commission never had any control over that money, at any time whatever.

Error by Courts below is departure from Constitution.

By the complaint and the petition for Rehearing and this petition, we have shown that no determination by the Commerce Commission could modify this trust, which was established more than six years before there was any such Commission (Tr. 43, 141). This trust fund could not be put in issue before the Commission. Under the constitution and law of Illinois all questions of ownership and

control over a trust fund is exclusively matter for the forum of a court of equity. *Cummings* v. *Smith,* 368 Ill. 94 at 105.

No determination by the Illinois Commerce Commission, nor by any court to test the same, has any bearing upon the legality of the fares or rates, nor upon any question of ownership of funds or property arising from reasonable or maximum fares, rates or charges permitted by order of such commission (Tr. 147-151). *Interstate Commerce Commission* v. *Inland Waterways Corporation,* 318 U. S. ....., 63 S. Ct. 1296 at 1304; *RFC* v. *Bankers Trust Co.,* 318 U. S. 163 at 170. The opinion by the Circuit Court of Appeals to the contrary (Tr. 115, 135) is fundamental error (Tr. 136, 149-151). That opinion and decree are denial of constitutional right of plaintiffs to a court forum for the judicial questions presented by this record.

Historic Consumer Cooperative.

Rights in common both real and personal have lasted for centuries and now remain a substantial feature of our social order. Among those rights the consumer cooperative is a basic institution of Democratic Society.

Rights in common both real and personal have been for centuries and now remain, a substantial feature of our common law. Among those rights the consumer cooperative is a basic institution of Democratic Society. Rights of common for pasturage of cattle, for fishing, for taking ice, for hunting wild game, for baking bread at an oven or grinding grain at a mill, are familiar instances. Currently there are: boating clubs, game hunting clubs, outing and mountain climbing clubs, hospital and medical service associations, turnpike associations, toll bridges, sewer and water and irrigation service districts, and countless others which charge the consumer a

small set fee whenever service is requested. These groups make use of public waters, public wild fowl, public highways and other public bases. The patrons of street railways have an abiding right of passage in the streets. It is elementary that the applicant who comes within the class fixed for enjoyment of any such right of common has had always the protection of our courts in the maintenance of the common fund which maintains the service in each case. Such rights have ever been common, and never were apportionable.

Re Aliena.

If it were true as the opinion by the Circuit Court of Appeals contends, that the petitioners do not have legal ownership to the fund, it would not follow that they have no right to pursue this suit. It stands admitted that petitioners are the only donors to that fund. There have always been in the law many sorts of interest in the property of others, which could be pursued, protected and enforced. *Re Aliena* is a large branch of the law of property. There are easements of many kinds. There are rights to light and air and rights to lateral support. The mortgagee may prevent the mortgagor wasting the substance of the property subject to lien. For instance may prevent destruction of valuable timber or buildings. There have always been charges on the property of others to raise portions and to provide annual support and for many other uses. A mere announcement of this field of law, is sufficient to show how superficial is the opinion under review, and lacking in understanding of the infinite variety of uses enforceable at court which may be carved out of basic property, either by express language as shown by this record, or by implication and social utility by direct action of the court as illustrated by the foregoing suggestions.

A distant tax-payer, not within the consumer area of a special assessment district, was allowed to intervene and be heard on objections, because as tax-payer he must be contributory and so has an interest in the charge made for public benefit at the street intersections. Those objections were heard and the proceedings were dismissed.

City of Moline v. *Greene*, 252 Ill. 475 at 480.

The Cooperative in Modern Law.

The modern co-operative economy was well established in England a century ago (Rochdale). The consumer co-operative and other phases of this economic order has spread to every State and territory of the United States and to most countries of the world. This voluntary development is at the heart of growing economic democracy. Some idea of the extent of this movement will be obtained by examining a **three volume index** now in the better libraries. That **index** is called "Literary Development of Co-operative Principles and Data: W.P.A. New York City, Series A." Part one, Index of Laws pertaining to Co-operation: Part two, Abstracts of the Laws pertaining to Co-operation in the United States, its possessions and territories: Part three, Bibligraphical Review of Literature on Legal Phases of Co-operation.

The consumer cooperative movement has advanced so far that in the State of Oregon and other places, the statute has made wide provisions for what are called Peoples Utilities. This is not municipal ownership in the usual sense, but a special form of consumer enterprise which seeks to enable the consumer motive to apply itself in a very flexible manner throughout the broad utility field named in the statute. This enables the consumer in a direct way to exercise a democratic control over the utility rendering the service to him. This manner of direct eco-

nomic control reduces greatly or substitutes in place of the utility regulation by state wide commissions. The Oregon plan of Peoples Utilities is discussed in a recent case:

> *Board of Directors of Northern Wasco County Peoples' Utility District* v. *Kelly,* 137 Pac. (2d) 295 at 299 and 306.

Correct reading and understanding of this court record will show that the Statutes in Oregon and other states are examples of the same Social Order intended by the 1907 Street Railway Ordinances at Chicago.

The Main Question Presented By This Petition.

The District Court suggested orally and the Court of Appeals say by its opinion (Tr. 114-116); that petitioners have no property interest in the fund to which it is admitted they have made contribution. Those courts say also that petitioners are not plaintiffs to require court performance of said trust. It follows that the basic question is one of law, namely:

What is the meaning and legal effect of the language of the 1907 street car ordinances,

> "a separate fund to be kept and used for the purchase and construction of street railways" (Tr. 8)?

What do those words mean in the light of the history of those ordinances, and the directions given by this Court and by the Circuit Court of Appeals, by opinions filed at that time; and in the light of the subsequent decrees by the District Court in confirmation of said opinions and said directions and said ordinances? Is this suit to restore and account for this social trust fund, proper litigation at the foot of said decrees so directed by courts of review in the year 1907 and thereafter? Has the District Court or the Circuit Court of Appeals any

discretion under the Constitution, to deny or limit the right of plaintiffs as cash revenue donors to said trust and as beneficiaries of this trust, to maintain this suit upon said admitted trust? Are those courts forums of grace and discretion, or do they perform obligatory duties under the Constitution?

Reasons Relied Upon For Issuance of the Writ.

By acts of conscience the chancellor has created our law of Equity. Shall equity and conscience now part company by denying to petitioners a forum which has been provided by the constitution, for accounting for social trust funds deposited by these petitioners! The record shows a deliberate intention by respondents and an executed purpose to frustrate and destroy this trust. It shows their purpose to hinder, delay and prevent the municipalization of street railways at Chicago. They seek to erase the fund created by money from your petitioners.

The inviolability of all *social trusts* in this country, is involved by the wilful acts by respondents toward the destruction of this trust fund, and the departure attempted by them from the purposes stated by the year 1907 ordinances. Existing trust funds in this country, which have little or no regular supervision by courts or executive government, now manage funds aggregating several billion dollars. Here now is presented a matter of public importance as surely as in *Mahnomen County Minnesota v. United States*, 63 S. Ct. 1254 at 1256 and like decisions.

By those ordinances of 1907 the funds exclusively are to be "kept and used for the purchase and construction of street railways" (Tr. 8, 115, 145). It stands admitted that the fund has not been *kept* and has not any of it been so *used*. The decrees of said District Court in the years

1907 and 1908, entered on mandates from this Supreme Court and said Circuit Court of Appeals (Tr. 139), confirm and adopt said ordinances of the year 1907 and thereafter, as contractual obligations of all parties thereto and all parties to this present record.

Meaning of basic trust language.

The words *Separate Fund* (Tr. 8) can mean only that the moneys are never to be part of any City of Chicago corporate or general fund. "To be kept" clearly are special words of limitation opposed to such historic phrases as "to have and to hold." To require that one must *keep* and must *use* his own money for a specific purpose, would be a contradiction in terms—would be words contrary to each other, would be rank absurdity. To keep money safely is the primary duty of every trustee and Fiduciary. The phrase "used for the purchase and construction of Street Railways" is a purpose so plain and direct that any man who walks the street can understand without restatement. That *use* has all the clearness and definiteness that words can possess. The only possible direct beneficiaries of such language and such fiduciary deposit of money, are the revenue patrons of said street railways, your petitioners, who created this fund specifically for the consumer ownership of said Street Railways to provide improvement of service and use for your petitioners. "Purchase and construction" include all current betterment and improvement in the art of communal transportation.

The social, legislative, economic and political history behind the 1907 ordinances (Tr. 39 to 43), shows that the 55% was intended to be a trust fund, and that the five cent rate of fare (Tr. 42), initially provided for by the 1907 contract ordinances, included a surplus of two cents for the purpose of making the 55% share a sufficient fund

within 20 years (1927) to purchase the street railway systems of Chicago (Tr. 40 ff.) for the benefit and use of the car-riders who were by the ordinances required to pay that additional two cents per ride to create the fund to purchase the street railways.

Analysis of Modern Consumer Cooperative.

The failure of the Courts below to understand this case, may be explained as a failure to appreciate the economic nature of this trust for the revenue patrons of street railways. Lawyers, office holders and business men are familiar with profit arrangements, with interest arrangements, and also with producer co-operative arrangements. Among the latter are trade associations, pooling of patents, and agreements by producers and merchandisers for buying commodities and selling the same. They are familiar also with eleemosynary and other philanthropic arrangements, where the return is purely spiritual.

The consumer co-operative social device seems to be absent from the main stream of legal and business thinking. The purpose of the consumer co-operative is not profit, nor interest, nor spiritual returns. The main purpose is advancement and betterment on the physical side of living, without debt. The consumer members as a whole own the co-operative as surely as all the stockholders own a corporation. But in neither case do they have the legal title and in neither case do they share any responsibility personally for the debts of corporation and co-operative. The oldest and most current example is the family, where each contributes of effort or supplies or money without any expectation of return other than more adequate physical comfort and better living surroundings. Farmers have always used this principle in their annual group arrangements for the slaughtering of food animals, for planting, harvesting and thrashing grain. The co-operating

group goes about from farm of one member to the farm of another member to produce the crops and living supplies in a joint manner, with much less effort and much less machinery. The store consumer co-operative enables the member to purchase more goods for the same money. It is called a discount, but usually there is no return of interest, profit or cash to the member. Ordinarily when a consumer co-operative breaks up, little or nothing remains for distribution or partition. The consumer co-operative is a social means that meets in a simple, direct and obvious manner the current desires and needs of its members, and quietly records their changing desires and new ways of living. It is the most flexible of all ways of human action. This economic device has not produced any volume of litigation. The reason may be related to that flexibility and quick response to the basic desires and comforts of the common man.

Examples of consumer co-operative where litigation has arisen are found mostly in the voluntary municipal field. Thus where a bond issue was voted to provide a consumer service, and the money collected, and afterwards it was determined that the bond issue was void, the money did not belong to the municipality, but must be returned to the contributors as a resulting trust. This was ordered even though the money had been assembled as municipal levy for taxes. *Town of Aurora* v. *C.B. & Q. Ry.*, 119 Ill. 246. Similar cases are these: *Haraway* v. *Zambie*, 157 S.W. (2d) 504 and *3105 Grand Corporation* v. *City of New York*, 288 N.Y. 178, 42 N.E. (2d) 475, *Site of Fort Dearborn* v. *City of Chicago*, 318 Ill. App. 139 at 143 and *Flanagan* v. *City of Chicago*, 311 Ill. App. 135. In these cases the court ordered that the surplus beyond the requirements of the co-operative consumer enterprise, must be returned to the contributors as a resulting trust.

Where there was originally a water system owned outright by the City of Dublin, and later there were contri-

butions by many householders pursuant to statute, for reconstruction and extension of that water system, the House of Lords reversed the Chancellor for Ireland, and ruled that the municipal officers must account to the contributing householders for all the money so received. (See page 35 below). That the fund must be restored and the extensions must be made for which the money was collected. (*1 Bligh* N.R. 312 at 361ff.). The courts have always enforced a close adherence to the specific purposes for which money has been paid or property delivered in trust (See page 38 ff below).

Modern Property Is Vested but Intangible Future Interest.

As shown by this petition at pages 8 to 20, the narrow conception of tangible property adopted by the Circuit Court of Appeals as its basis for right to have court relief, has no support in the decided cases. That narrow physical concept never has had expression since some dicta were made by Lord Eldon. In modern life it is elementary that most property investments are made without any expectation of power to possess or manage the remote physical properties that are owned in the possessory and management sense by corporations, associations or trustees. Membership in law libraries and educational museums are examples. (The modern corporation—Berle & Means; The Managerial Revolution—Burnham.) The opinion by the Court of Appeals at bar would take away from modern investors all court relief as to all but a negligible amount of what is called *property* by everybody and by all other courts in the modern world.

Trust has priority regardless of insolvency.

It is elementary that trust priorities survive even bankruptcy (Tr. 156). This court should protect the earlier decrees, and enforce the prior law of this case (Tr. 122),

vested in plaintiffs by said court decrees; should prevent waste and sabotage (Tr. 148); should assure equal protection of the law (Tr. 151) and due process of law, and should maintain the constitution (Tr. 154).

The bold determination by the respondents to use this fund without limitation, and in utter disregard of the basic language of purpose for the trust; namely, to be "kept and used for the purchase and construction of street railways," is emphasized when we consider the well known fact that the elevated railways were organized and are operated under the laws of Illinois governing steam railroads. Those laws are distinct and separate, having a wide cleavage different from the laws pertaining to street railways. The decisions of the Supreme Court of Illinois as to that cleavage and separation are well known, and were well known before these ordinances were adopted in the year 1907 and ever since. Any claim by the respondents that they could ever by the remotest argument justify the use of the fund or any part of it, for the construction of subways in Chicago to be used by the elevated railroads in their transportation, shows a moral bankruptcy beyond any redemption. Even if it ever had been true, or ever will be true that any substantial number of persons using the elevated system of railway transportation also might or would use the street railway system of street transportation. The fact is that the lay out of the two systems of transportation is such that any interchange of passengers between them, which may be arranged in the future, will be an utterly negligible percent of the total travel upon either system.

Since the wrong to an individual consumer with reference to a particular service is a matter of pennies on any particular day, it would be impossible for humble citizens to carry to the courts by separate individual lawsuits, their grievances about consumer cooperative services. It would

also be absurd for the court to be hearing complaints separately from many individuals, about a state of facts which would be the same to all of them. Only by this manner of class suit can relief be sought.

So long as the Car Riders Service and Purchase Fund remained intact, it served as an economic force for the trustees to compel the Street Railway Companies to obey the orders of the Commerce Commission and the City Ordinances. For that reason even persons who do not favor consumer ownership of utilities, urged that it was highly essential to keep the car riders fund available at all times. Those who hold to that opinion maintain that by dissipating the car riders' fund, the respondent trustees threw away the major control which they held as trustees in the public transportation program.

The defendants by timely application in chancery for instructions and guidance in the management of this trust, could have prevented and rendered unnecessary the wastage of millions of dollars in the Street Railways *company reorganization* proceedings at Chicago. Defendants wilfully have failed to perform that duty, and now boldly renounce all their duties as trustees under the 1907 Ordinances (Tr. 19).

Faithful trustees must avoid forbidden morals of the market place.

Meinhard v. *Salmon,* 164 N. E. 545 at 546:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising

> rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. *Wendt* v. *Fischer,* 243 N. Y. 439, 444, 154 N. E. 303. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

The foregoing opinion by Judge Cardozo was quoted from and approved by Mr. Justice Douglas in the case of *Woods, Trustee,* v. *City National Bank,* 312 U. S. 262 at 269. Similar doctrine is confirmed by *Hilmer* v. *Bishop,* 316 Ill. App. 411, 45 N. E. (2d) 188 at 189-190.

Contrasted Record of Faithful Trustee Against Record of Wanton Trustee.

It appears from thirty-fifth annual printed report, of Board of Supervising Engineers under the year 1907 Ordinances for the year ending January 31, 1942, (Ex. T, page 85) that an aggregate of more than *three hundred million* dollars had been collected and retained as interest and company share by the Street Railway Companys, after the year 1907 and before date of this report. Out of that money the bondholders have been paid regularly. The interest due August first 1943 in the sum of $1,833,447.30 has been paid upon said bonds now said to be currently outstanding. The trustee established under the year 1907 ordinances and the trust deed pursuant thereto, for protection of said bonds and for collection and distribution of interest, has been diligent and successful, notwithstanding all the vicissitudes of the years in question.

Compare that record with the conduct of respondent trustees having duties to your petitioners under the same Ordinances:

1) By deliberate written acts they have dissipated Seventy-five million dollars in open disregard of the plain purposes of the trust (Tr. 157).

2) Since the year 1931 they have failed to demand or collect any additions to the fund (Tr. 157).

3) They have failed to make any investments pursuant to the elementary duty of trustees, and have ignored entirely the statutes of Illinois which govern and control such investments (Tr. 51, 94, 157).

As was said by this Court speaking by Mr. Justice Holmes, (*New York Trust Co.* v. *Eisner,* 256 U. S. 345 at 349) * * * "A page of history is worth a volume of logic."

4) Although the Street Railway properties were offered for sale on May 29, 1936, under mortgage foreclosure decrees dated May 11, 1931, and a bid less than thirty-two million dollars was reported to the court on June 19, 1936, the respondents stand aloof without making any bid, and still allow the record to remain in that condition (Tr. 147). That sale in collateral proceedings was given an interlocutory approval by order of the District Court on November 21, 1936. No confirmation of the sale has ever been made. It remains under advisement by that court and subject to its order (17 F.S. 181), in said wholly collateral proceedings. Although they had ample funds in hand (Tr. 12, 157), respondent trustees have taken no action whatever to perform their duties as to the purchase of said properties, at said sale or at any other time.

In a city of great distances such as Chicago, where an average car rider spends two hours daily on public transportation, failure to provide a comfortable seat and sufficient space for reading and relaxation, during the trip to and from work, or market or place of recreation, is a matter of primary importance to the social order. When that service has been paid for in advance by the consumer

class, that public importance should be paramount reason for inquiry and determination by this Court. That conditions of crowding and increase of standees and strap-hangers grows worse each year is common knowledge. It would be considered inhumane to load cattle or sheep as compactly as people are now herded upon street railway transportation at Chicago (Tr. 44).

Under the year 1907 Ordinances down to date, your petitioners as said consumer class have paid as car fare (including the purchase price) an aggregate sum nearly **two billion** dollars. (The figures from February 1, 1907 to January 31, 1942 appear at Exhibit T page 85 of the thirty-fifth official annual report of said Board of Operating Engineers). The time for fruition of E. M. O. (page 3 above) has arrived.

Public dangers from trust sabotage.

If this trust is sabotaged successfully, then all social security programs in this country are additional follies. That follows whether they be private or governmental. All cooperative endeavors of democracy will be at the mercy and discretion of reactionary groups who are entrenched and able to wield economic pressure, and current political seizure for any momentary use or partisan expense. The assurance of security for all consumer cooperatives will be erased. The prophetic language of Mr. Winston Churchill will have been translated into fact; there will be no longer any "steady continuity of values." And without that basis there can no longer be *"any faith between man and man or between individual and state"* (Tr. 156). Unless reversed by this court, the record at bar follows the road back to jungle ways of social order.

Misconduct of other trusts by respondents.

The recurrent practices and conduct of the defendants at bar, to delay beneficiaries and to waste special trust funds, (for instance, Real Estate Assessment and condemnation moneys) by all manner of departures and diversions from their trust purposes, is shown by many decided Illinois cases. Among them are *Site of Fort Dearborn* v. *City of Chicago,* 318 Ill. App. 139 at 143, *Flanagan* v. *City of Chicago,* 311 Ill. App. 135, *City of Chicago* v. *Union Trust Company,* 138 Ill. App. 545, *Barber* v. *City of Chicago,* 139 Ill. App. 121, and *Conway* v. *City of Chicago,* 237 Ill. 129, 131 ff.

An orientalist at the University of Chicago remarked the other day that it is a well known fact of ancient history, that Egyptian officialdom had sabotaged and stolen all the security funds set up for maintenance and operation of the earlier burial tombs in the Nile Valley, within a century after those funds were established. It appears from the 1943 appropriation ordinance of the City of Chicago passed January 8, 1943 (Page 8170 of City Council Proceedings) that history is about to repeat itself after five thousand years, by consummation of a deliberate like waste and destruction of the trust fund for car-riders; unless this court takes action to stay the largest operation by confidence game that has yet been attempted.

How Street Railway transporation has been financed.

In New York and some other cities of this country, a low street car fare has been maintained by charging the deficit to the general taxpayer and the common public revenues. In Boston at the present time, the deficit is charged to the State, pursuant to statute. In Chicago there seems always to have been a public attitude against

that kind of public policy. The recurrent breakdown in Chicago of street car and other transportation services which have been financed purely on the profit and interest economic basis, which go to bankruptcy by accumulation of debt; is commonly known and is recorded in all sorts of public documents, including the litigations which are listed at Exhibit A to this petition (page 58 below).

Consumer Cooperative in this Record.

A reading of said cases and of the record in this case, makes it clear why this consumer co-operative, car-rider trust was decided upon in the year 1907, as the most likely solution of recurrent bankruptcy of transportation companies in the Chicago region. Within the limits of this petition it is not possible to do more than state the fact. There is vast literature on the subject. Much of it is governmental and matter for judicial notice.

The failure of respondents to administer fairly and faithfully this co-operative consumer trust, has led to a wastage of more than ten million dollars in court expenses at Chicago, in an attempt which has been futile for the past seventeen years, to reorganize the street railway companies in the Federal Courts *upon a profit and interest basis.* That very basis has been a complete failure for almost a hundred years, as shown by this record and other extensive public record. The language of this trust was carefully drawn (Tr. 8) (during court reorganization 1903) to prevent either the street car companies or their stockholders or their bondholders (making any inquiry, or) from even a claim to have the slighest interest whatever to direct or control this trust. That was a very wise provision. The trustees must be free to bargain and purchase the street railways in the most advantageous manner. The 1907 ordinance built a fire wall around this trust to prevent it going down should financial cataclysm carry away the reorganized Street Railway Companies. All the litigations which

those people having property interest in the street railways, have carried on among themselves in Courts of Illinois and the Federal Courts of Chicago, (some of them are in Exhibit A hereto) have no legal relevancy and cannot control the interpretation and performance of this trust. Your petitioners were not parties to any of those litigations. The social purposes of the 1907 ordinances could not be destroyed by any of these litigations. The courts below on this record wholly overlook that language of the trust agreement in the 1907 ordinances (Tr. 8).

Erosion of Bills of Rights.

It has been said that liberties and bills of right may be "lost in time by steady legal erosion wearing down broad principles into thin right." Petitioners deem it idle to mention civil liberties, or for anyone to discuss freedom from want and freedom from fear, if our courts callously do sanction this bold seizure of a fund exceeding one hundred million dollars created for the purpose of consumer financing and ownership of Street Railway Systems of Chicago, to free that service forever from political sabotage. The reserved sphere of individual liberty and privacy of property, guaranteed by all our constitution, (page ..... above) thereby is made a mirage. Our cherished civil liberties thereby would become an economic quicksand. There can be no self-realization for any human being, but only the stunted life of economic serfdom, under official oppression and the selfish devices of individuals dominant at the time by association with economic power groups, if our sturdy law of trusts and economic cooperation may be frittered away by the clever political confusion shown by this record! Petitioners urge that the constitution should be maintained. And urge that said trust should be restored and performed as their purchased security and sanctuary.

Five decades of cooperative economy.

Petitioners respectfully suggest that the debt-interest-profit-dividend form of insurance organizations, came to grief in this country during the 1900's, and life insurance was rescued tardily only by major legislative surgery. So that insurance since then is largely of the consumer mutual co-operative type in this country. Likewise in the second decade of this century, the money of the people was lost in large measure when loaned on foreign securities of the old order. Those losses brought about co-operative foreign credit arrangements. And again in the third decade of this century alien property and also oil reserves came to heavy grief, because there was no consumer co-operative for direct control or use. And again in the fourth decade the money of the people came to grief in the mortgage banks that were organized under the old order. Only after great distress and much national legislation was a safe consumer co-operative program set up in the Savings and Loan and similar institutions. Now in the fifth decade of this century, the country is faced with a similar problem in that vast resources of the people are in foundations and trusts having no regular government or official supervision or examination. (Compare as one example American Foundations and their fields. 1942 Seybold.) So the trusteeships that are thus on the loose today are in free control of many billions of dollars of credit belonging to the people. The Court of Chancery by developing the law of trusteeship as it has done, to be without supervision until complaint is made by someone at court, has set loose in the economy of the country a very great power, an anti-social power. When the court (as the courts below in this case have done), refuses to order the trustee to account and refuses to give the co-operative owner of the fund and consumer beneficiary of the invest-

ment, any right of inquiry or any relief whatever; society generally has great cause for alarm.

The dangers to the people and their money, which lie in this situation, arising from the fact that the law of equity has been created by the courts without periodic supervision or restraint, is in fact causing alarm. Legislation is being proposed to have all trusts, public and private, register and report regularly to some state official. As shown by the *City of Dublin case,* 1 Bligh N.R. 312, elsewhere discussed in this petition, the making and filing of such reports will not, however, solve the problem of supervision, and would not relieve the Court of Chancery from its duty as Paramount Judicial Sovereign, to supervise and control all trusts whenever complaint is made. In the *Dublin* case, pursuant to statutes by Parliament, there were reports made to Parliament. After fifty years it was contended by the City of Dublin and its officials, that those reports established an accounting and consummated an exclusive ownership of the fund by the City of Dublin, and wholly removed all duty and power of the Courts of Chancery to order an accounting and performance of the trust. In that case after a review of the growth of equity, that contention was denied and overruled by the House of Lords in that historic case. 1 Bligh N.R. 312. By this decision of the House of Lords, the economic experiment of the people in consumer cooperation was allowed free play and permitted to prevail in England.

Petitioners respectfully show that the effort by the trustees in the *Dublin* case, after 50 years of operation, to *chill the trust by strong words and bold repudiation,* has been repeated by the respondents at bar and by the courts below. This Supreme Court is now asked by your petitioners to follow the example of the House of Lords; and announce an urgently needed affirmation of the historic principles of equity, by an application to the current co-

operative economy as presented by this record. Thereby you will (1) Sustain a consumer co-operative trust, (2) Restore to the people the sanctity of trusts, and (3) Render inescapable the duty of unfailing loyalty by respondent trustees.

Prayer for Relief on This Petition.

Your petitioners submit that they did not receive *due process* of law nor *equal protection* of the law, in said District and Circuit Court of Appeals in this case. The adverse action by District Court and Circuit Court of Appeals for the Seventh Circuit, is such on this record as to call for review and reversal by the Supreme Court of the United States.

WHEREFORE, petitioners pray the allowance of a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein by said District Court and Circuit Court of Appeals may be reversed, that the trust funds for the consumer financing and beneficial ownership of Street Railways at Chicago may be restored and preserved and for such relief as this Court may direct.

WEIGHTSTILL WOODS,
Counsel for Petitioners.

AUTHORITIES FOR APPELLANTS AND PROPOSITIONS OF LAW.

A-1) The primary duty is obligatory upon courts both state and national, to hear and determine assertions upon the Bill of Rights and other constitutional questions and federal questions, which are presented by the record.

Article VI of the Constitution of the United States, (Second Paragraph).

West Chicago Street Railway Co. v. *Illinois ex rel Chicago,* 201 U.S. 506 at 519-520.

Coombes v. *Getz,* 285 U.S. 434.

Sola Electric Co. v. *Jefferson Co.,* 317 U.S. 173 at 176.

A-2) This suit comes at the foot of decrees entered in the United States District Court (then Circuit Court) at Chicago in the year 1907, (which decrees are contractual in nature) in conformity to mandates from this Supreme Court and the United States Circuit Court of Appeals for the Seventh Circuit. This suit seeks restoration and accounting for funds in trust arising under and supported by said decrees.

Title 28, Sec. 876, Federal Code Annotated.
Tr. 156.

A-3) Upon the offer made by their own ordinances, the defendants voluntarily became trustees, to collect the funds in question, with power and duty to invest only in street railways at Chicago.

New Orleans v. *Warner,* 167 U.S. 467 at 477 and 175 U.S. 120 at 122, 130.

Attorney General v. *Mayor of Dublin,* 1 Bligh N.R. 312 (House of Lords decisions).

The Maccabees v. *City of North Chicago,* 125 F. (2d) 330 at 333.

Town of Aurora v. *C. B. & Q. Ry.,* 119 Ill. 246.

A-4) By payment of two cents or more excess fare for each ride, each plaintiff became an original party in privity with the trust agreement. Said trust establishes a consumer cooperative for street car service. Any beneficiary who is named or who is described in a contract or trust, or who makes contribution to a common fund for a common purpose, may sue to enforce the benefit, whether or not he knew at the time about the transaction, upon whose occurrence the language of the trust agreement, vests in such claimant the benefit.

These are Illinois decisions:

Woolenberger v. *Hoover,* 346 Ill. 511 at 594.

Dean v. *Walker,* 107 Ill. 540 at 545 ff.

Carson Pirie Scott & Company v. *Parrett,* 346 Ill. 252 at 257 ff.

These are Court of Appeals decisions:

American Can Company v. *Garnett,* 279 Fed. 722 at 725.

Commodity Credit Corporation v. *Henwood,* 126 F. 2d 145 at 147 ff.

Ohio Casualty Co. v. *Beckwith,* 74 F. 2d 75 at 78.

These are recent rulings by other courts:

Re Weininger's Estate, 239 Wis. 432; 1 N.W. 2d 880 at 882.

Magna Mfg. Co. v. *Aetna Casualty Co.,* 129 N.J. Eq. 142 at 147.

Bankers Co. v. *Monarch Co.,* 123 West Va. 53 at 61, 14 S.E. 2d 922 at 926.

A-5) There remains vested in each plaintiff as beneficiary an undisputable right to have the trust fund administered, as created in writing and established on February 1, 1907. The meaning of the Constitution is that purchase money and accruing interest are held in trust by the City to accomplish full services and satisfaction to the car-rider.

Conway v. *Cable,* 37 Ill. 82 at 90.
Inhabitants of East Sudbury v. *Belknap,* 18 Mass. 512, 519.
Boston Elevated Ry. Co. v. *Commonwealth,* 310 Mass. 528 at 556.
Barnard v. *City of Chicago,* 270 Ill. 27 at 31.
City of Moline v. *Greene,* 252 Ill. 475 at 480.

The constitution and the commentators emphasize this primary doctrine of American law of property.

(Tr. 47-48.)
Potter's Dwarris on Statutes and Constitution at pages 387, 474.
Pomeroy 5th Edition, Equity, Section 1250, pages 738, 749.

A-6) The defendants are voluntary active trustees of an express trust, assumed by them wilfully, with all obligations incident to private contract and trust relationship. The trust is evidenced by provisions of the Constitution of Illinois herein relied upon, and by municipal ordinances which are described by the complaint. The plaintiffs are beneficiaries of that trust.

Wall v. *Chicago Park District,* 368 Ill. 81 at 91 ff.
Hall v. *State of Wisconsin,* 103 U.S. 5 at 11.
Richmond v. *Irons,* 121 U.S. 27, 55, 56.
Pulsifer v. *Greene,* 96 Maine 438 at 445.
Burnett v. *West Madison State Bank,* 375 Ill. 402, 406.

People v. *Village of Glencoe,* 372 Ill. 280, 282.
Altschuler v. *Chicago City Bank and Trust Company,* 380 Ill. 137, 142.
Cummings v. *Smith,* 368 Ill. 94 at 105, 13 N.E. (2d) 69 at 74.

A-7) The defendants should have performed the trust and they must account for the traction fund which is brought into court by this record. The defendants have received and they hold trust funds, which are applicable to the purchase and upkeep of common transportation services, due to be maintained by the defendants for the use of these plaintiffs, who are beneficial owners of all funds which are described and brought into court by this record.

Complaint in Chancery, Tr. pages 2 ff.

A-8) The constitutional provisions asserted by this suit as sources and confirmation of the trust are mandatory and are self-executing without legislation.

People ex rel Markgraff v. *Rosenfield, Director of Public Works and Buildings,* 383 Ill. .....
People v. *Smith,* 374 Ill. 286, at 288.
People v. *Kelly, Mayor,* 361 Ill. 54 at 59, 60.
People v. *City of Chicago,* 378 Ill. 453 at 458.

A-9) The refusal by the Courts below to hear and pass upon the constitutional matters presented to them by this record was an arbitrary abdication from Judicial duty.

Petition for rehearing (Tr. 120-157), and authorities there mentioned.

A-10) The English cases fully sustain these petitioners.

Charitable Corporation v. *Sutton,* 2 Atk. 400 at 406, (1742).

Thomas Sturge and others v. *The Eastern Union Ry. Co.*, 7 DeGex M. & G. 158, 169, 174 (1855).

Attorney General v. *Mayor of Dublin*, (1827), 1 Bligh N.R. 312. House of Lords decisions.

B-1) The District Court has all power necessary to enforce and to administer this trust. Its power to do so can neither be abridged nor limited by the General Assembly of Illinois.

Illinois State Constitution, Article VI, Paragraph 12.

Rothschild v. *Village of Calumet Park*, 350 Ill. 330, 338.

Black & Yates v. *Mahogany Ass'n*, 129 Fed. (2d) 227 at 233.

B-2) In deference to the constitution as asserted by this suit, and the duties of defendants as trustees, every court of equity will disregard all demands and self-serving suits and documents of purported release asserted by defendants, and will disregard all such suits and purported releases so obtained by defendants.

Campbell v. *Albers*, 39 N.E. 2d 671, 313 Ill. App. 152.

White v. *Sherman*, 168 Ill. 589 at 605, 610.

American etc. v. *City of Avon Park*, 311 U.S. 138 at 145.

Hatch v. *Hatch*, 9 Ves. Jun. 292.

Ingram v. *Lewis*, 37 Fed. (2d) 259 at 263.

Ill. Merchants Trust Co. v. *Harvey*, 335 Ill. 284, 289.

Peter v. *Peter*, 343 Ill. 493 at 500.

Rudin v. *City of Harvey*, 377 Ill. 595 at 601.

Northwestern Yeast Co. v. *City of Chicago*, 301 Ill. App. 303, 309.

Fry v. *Pence*, 261 Ill. App. 218, 232 and 239-240.
McKeon v. *Pridmore*, 310 Ill. App. 634, 647.
Sands v. *Sands*, 112 Ill. 225 at 231.
Restatement of Trusts, Section 217, (b-c-e).
Bogert on Trusts, Section 493.
Scott on Trusts, Section 343.

C-1) The named plaintiffs have the right to file this class suit on behalf of themselves and all other persons in like situation. The named plaintiffs are members of that class of persons who own the trust fund in common in equity and have rights and interests in common. The record presents an appropriate class suit for relief in equity.

Guilfoil v. *Arthur*, 158 Ill. 600 at 605.
Flanagan and others v. *City of Chicago and others*, 311 Ill. App. 135, 157-160 (leave to appeal denied).
Supreme Tribe of Ben Hur v. *Cauble*, 255 U.S. 356, 363.
Boesenberg v. *Chicago Title & Trust Co.*, 128 Fed. (2d) 245, 246.
Haraway v. *Zambie*, 157 S.W. 2d 504.
Hillmer v. *Chicago Bank of Commerce*, 375 Ill. 266 at 268.
39 American Jurisprudence 917, parties section 44 ff.
Site of Fort Dearborn Corporation v. *City of Chicago*, 47 N.E. (2d) 564, 318 Ill. App. 139.

C-2) The complaint in this record states facts, as to diversity of residence and citizenship, for the named plaintiffs and all the defendants, and as to value and amount of property involved, sufficient to vest jurisdiction over a class suit, in United States District Court and this Court.

Boesenberg v. *Chicago Title and Trust Co.*, 128 Fed. (2d) 245 at 246.

Buck v. *Gallagher*, 307 U.S. 95 at 104.
Eresch v. *Braecklein*, 133 Fed. (2d) 12-13.
City of Orangeburg v. *Southern Ry. Co.*, 134 Fed. (2d) 890.

C-3) The court of chancery has inherent and original control over all trust matters. This record shows need for that exclusive remedy against the misconduct of trust matters by the defendants.

These are Circuit Court of Appeals decisions:

The Maccabees v. *City of North Chicago*, 125 F. (2d) 330 at 333.
Black & Yates v. *Mahogany Ass'n.*, 129 Fed. (2d) 227 at 233.
Natural Gas Pipeline Company v. *Federal Power Commission*, (C.C.A.), 128 Fed. (2d) 481 at 486, 487.
City of Jacksonville v. *Bankers Life Co.*, 90 Fed. (2d) 141 at 144.

These are Illinois Supreme Court decisions:

Norton v. *Hixon*, 25 Ill. 371, 373.
(Old edition page 439 at 452).
Mettler v. *Warner*, 249 Ill. 341 at 347.
Davis v. *City of Chicago*, 333 Ill. 422 at 426, 428.
Village of Hinsdale v. *Chicago City Missionary Society*, 375 Ill. 220.
Board of Education of City of Rockford v. *City of Rockford*, 372 Ill. 442.

C-4) By force of constitutional provision, the chancery powers of Courts sitting in Illinois cannot be abridged nor limited by the General Assembly. The purchase price for street railways is a trust res which the District Court has power to enforce and to administer in chancery.

Illinois State Constitution, Article VI, paragraph 12.

Howell v. *Moore*, 127 Ill. 67 at 79.
County of Cook v. *City of Chicago*, 311 Ill. 234 at 237.
Flanagan v. *City of Chicago*, 311 Ill. App. 135.
Rothschild v. *Village of Calumet Park*, 350 Ill. 330 at 338.
Getz v. *City of Harvey*, 118 Fed. (2d) 817, 824 ff.
Hart v. *Central City*, 159 S.W. (2d) 18.
Siefker v. *City of Chicago Heights*, 297 Ill. App. 113 at 117, and cases there cited.

C-6) By their conduct and their manner of defense of this suit, which are in violation of state and federal constitutions (Tr. 47-48), the defendants seek to accomplish direct impairment and departure from the trust relationship with your plaintiffs arising from voluntary contract trust ordinances, under the terms of which the defendants accepted funds and powers and assumed duties for the use and benefit of these plaintiffs.

Wall v. *Chicago Park District*, 378 Ill. 81 at 91 ff.
Kinney v. *Lindgren*, 373 Ill. 415 at 421.
Toman County Treasurer v. *Hotel Corporation*, 381 Ill. 41 at 45.
Constitution of Illinois, Art. 2, Section 14.
Article I, Section 10 and the Fourteenth Amendment to Constitution of the United States.
Murray v. *Village of Skokie*, 379 Ill. 112.

D-1) The trust res at bar has been disguised otherwise concealed by respondents. Plaintiffs should have restoration for all trust money and funds misapplied by the defendants for any purposes not within the language of this trust.

Fichter v. *Milk Wagon Drivers Union*, 382 Ill. 91.
3105 Grand Corporation et als. v. *City of New York, et al.*, 42 N.E. (2d) 475; 288 N.Y. 178.

Haraway v. *Zambie,* 157 S.W. (2d) 504.
Town of Aurora v. *C.B. & Q. Ry. Co.,* 119 Ill. 246.
Kerner v. *Thompson,* 365 Ill. 149 and 293 Ill. App. 454, 460 ff, certiorari denied 305 U.S. 635.

D-2) Full compensation and restoration includes interest for delay and compound interest for abuse of authority.

(Tr. 9, 89; Year 1907 ordinance).
Norfolk and Western Ry. Co. v. *Board of Education of the City of Chicago,* 114 Fed. (2d) 859 at 862.
Seaboard v. *United States,* 261 U.S. 299 at 305.

D-3) The plaintiffs should have relief pendente lite.

The motions for plaintiff for relief *pendente lite* by discovery and accounting, etc., should have been granted by the trial court, and should now be allowed and directed by order from this court.

Sprague v. *Ticonic National Bank,* 307 U.S. 161 at 168.
Warren v. *Palmer,* 310 U.S. 132 at 139.
Board of Commissioners of Vanderburgh County v. *Sanders,* 30 N.E. (2d) 713 at 714, 131 A.L.R. 1048.

D-4) The extent of the duty of defendants to restore the trust fund so that the trust may be performed as the court may direct, is the only issue that the defendants will be heard to contest.

Rudin v. *Village of Harvey,* 377 Ill. 595 at 602.
Getz v. *City of Harvey,* 118 Fed. (2d) 817 at 827.
Earl v. *Picken,* 113 Fed. (2d) 150 at 158-159.

D-5) Corporate Trustees are held to a high degree of fidelity and ability. Municipal authorities who seek this character of responsibility, claiming that they are specially qualified and financially responsible, should be held at least to the same degree of fidelity as other trustees. "Good faith alone will not protect a trustee, but he must also exercise diligence, prudence and absolute fidelity."

In Re Clark's Will, 242 N. Y. S. 210.

Harrison v. *First Wisconsin Trust Co.*, 191 Wis. 23; 209 N. W. 945, 947.

Busby v. *First National Bank of Chicago*, 288 Ill. App. 500, 520; 6 N. E. (2d) 451 at 459.

United States National Bank and Trust Co. v. *Sullivan*, 69 F. (2d) 412 at 415.

Churchill v. *Peters*, 134 Pac. (2d) 841, 847.

D-6) By Statute in Illinois which reenacted an Act of 13 and 29 Eliz. 1568 and 1684, no transaction in Court or outside, aids a fiduciary or binds a beneficiary of trust, no matter how solemnly a release is made, unless and until there has been a prior and complete accounting and disclosure honestly made.

Chap. 59, Section 4, Ill. Rev. Stats. 1939.

White v. *Sherman*, 168 Ill. 589, 605, 610.

Kinney v. *Lindgren*, 373 Ill. 415, 422.

Nonnast v. *Northern Trust Co.*, 374 Ill. 248 at 271.

D-7) Franchise ordinances have not lost their character as contracts. They were recognized and given effect in

Georgia Railway Co. v. *Decatur*, 262 U. S. 432; 67 L. ed. 1065 and *Southern Utility Co.* v. *Palatka*, 268 U. S. 232; 69 L. ed. 930; *State* v. *Mo. Utl. Co.*, 339 Mo. 589; 96 S. W. 2d 607, 614-18; *City of Chicago* v. *Hastings Express Co.*, 369 Ill. 610; *City of Geneseo* v. *Northern Illinois Utilities Co.*, 378 Ill. 506.

D-8) If a case is arbitrarily and capriciously decided, in violation of settled principles of law, or contrary to undisputed facts, though the court so deciding has jurisdiction, the judgment is in violation of due process of law under either the fourteenth or fifth amendments. The United States Supreme Court should and will review and correct the error.

Postal Telegraph Cable Co. v. *City of Newport*, 247 U. S. 464.

Williams v. *Tooke*, 108 F. (2d) 758, 759.

Cities Service v. *Dunlap*, 308 U. S. 208.

D-9) Equity sustains by court action the modern conceptions of property and advancing social organization. The book of chancery is never finished.

30 C. J. S. 331—Equity §12 and authorities there assembled.

First National Bank of Chicago v. *Bryn Mawr Beach Building Corporation*, 365 Ill. 409 at 421.

Warfield-Pratt-Howell Co. v. *Williamson*, 233 Ill. 487, 497 ff.

Argument Upon Constitutional Matters.

Respondents rely upon *Barsaloux* v. *City of Chicago*, 245 Ill. 548 and *People* v. *City of Chicago*, 349 Ill. 504. It is established as fact by the complaint (Tr. 54-55) that those cases and others there analyzed, were mere collusive transactions deliberately undertaken to sabotage the car-riders service trust, without disclosure to the Courts and without making beneficiaries of this trust parties to any of those proceedings. In each of these lawsuits all parties were in common interest on *one side of the record only*. Those cases were pure deceit and shadow boxing. The motion to dismiss in this case at bar, admits that is so.

The futility of the *Barsaloux* line of cases which were collusively foisted upon the courts by the respondents is clearly shown by the reasoning in another Illinois case, *Dudick* v. *Baumann*, 349 Ill. 46 at 49, 50 and 51:

> "The right of a *tax-payer* to prevent misappropriation of public funds has always been recognized by this court on the grounds that in equity tax-payers are considered the owners of the property of the municipality, and whenever public officials threaten to pay out *general public funds* for a purpose unauthorized by law, or misappropriate such funds, and thereby cause taxes to be levied to make good the misappropriation, equity will assume jurisdiction to prevent such unauthorized act, as the tax-payers' right in such case is not recognized by courts at law. (*Fergus* v. *Russel*, 270 Ill. 304; *Jones* v. *O'Connell*, 266 Ill. 443; *Burke* v. *Snively*, 208 id. 328; *Beauchaump* v. *Kankakee County*, 45 Ill. 274; *Colton* v. *Hanchett*, 13 Ill. 615). The interest of the *general tax-payer*, however, must be based upon *the right of the municipality in and to the funds.* Special assessment funds are raised for the purpose of paying for the local improvement. The only interest which the city or village has in such funds, other than the right to be reimbursed therefrom for costs advanced, is to see that they are properly collected and used to pay for the improvement or bonds issued therefor. After the discharge of the expense of the improvement and the cost of collection, the balance, if any, belongs to the property owners against whose property it was assessed and should be returned to them. *Donahue* v. *Village of LaGrange*, 263 Ill. 607.
>
> "Counsel for appellant argues, however, that because there may be a misappropriation of the funds after the same have been collected by the village

officers, for which the village would be liable and the tax-payers taxed, he has an interest as a tax-payer. He also seems to find some interest as a general tax-payer in his claim that Baumann had no right to retain two per cent of the amount of assessments collected. Unless it appears from the bill that the public funds or village liability is in some way affected by such retention a general tax-payer has no such interest as authorizes suit by him. Special assessment funds are trust funds for a specific purpose and are not part of the general revenues of the municipality raised by general taxation. (*Donahue* v. *Village of LaGrange, supra; Conway* v. *City of Chicago,* 237 Ill. 128; *Bradford* v. *City of Chicago,* 25 id. 349.) Under section 12 of article 7 of the Cities and Villages act (Cahill's Stat. 1931, p. 348) all moneys received on any special assessment are required to be *kept in a special fund* to be applied to the payment of the improvement for which the assessment was made, and for no other purpose unless to reimburse the corporation for money expended for such improvement. The mere possibility that under some circumstances the village of Niles Center may be required to make up a deficiency in public funds not shown or alleged in the bill is not sufficient to give appellant the right to maintain a bill in equity on the ground of his *interest as a general tax-payer.* • • • No facts showing such an interest have been alleged in the bill. Appellant is not one of those whose property has been assessed and is therefore not interested in the disposition of the assessments collected, unless a situation arises which would lead to a misappropriation of public funds and necessity for levying taxes to meet obligations of the village because of such misappropriation. He makes no such showing.

"A general tax-payer's right to sue in equity to protect public funds is based on his equitable ownership of such funds and on his liability to replenish the public treasury in case of misappropriation of those funds. Unless he makes such a case by his bill he has shown no right to sue in equity, *Fergus* v. *Russel, supra; Jones* v. *O'Connell, supra; McCord* v. *Pike,* 121 Ill. 288; *City of Chicago* v. *Union Building Ass'n,* 102 Ill. 379; *Merritt* v. *City of Duluth,* 103 Minn. 236."

The paramount dominance of the constitution was stated thus by *Lobdell* v. *City of Chicago,* 227 Ill. 218 at 245:

"This court has nothing to do with the policy of *the municipalization of street railways* in the cities of this State. It is its duty, however, to enforce the provisions of the constitution as it finds them written in that instrument. Section 12 of article 9 of the constitution is a wise provision, and must be enforced and applied by the courts until its provisions are changed by the people in the manner provided in the constitution. In *Dolese* v. *Pierce,* 124 Ill. 140, on page 149, it was said: 'The highest duty and most sacred function of this court is to protect and enforce the constitution, regardless of all real or imaginary inconveniences that may result from doing so.' And in *Village of Hyde Park* v. *City of Chicago,* 124 Ill. 156, on page 163: 'The voice of the people is all-powerful when expressed in pursuance of laws that are passed in obedience to the constitution. But until the people vote to amend or change the constitution in the mode which they themselves have designated, they, as well as their officials, are bound to obey its mandates.'

"The briefs filed in this case are voluminous and the arguments have taken a wide range. As the ques-

tion considered by this opinion is controlling, we have not deemed it necessary to consider herein any of the other questions which have been raised and discussed in the briefs.

"Having reached the conclusion that the proposed issue of $75,000,000 in street railway certificates of the city of Chicago, and the execution of said trust deed or mortgage to secure their payment, will create an indebtedness of the city of Chicago beyond the constitutional limit, the decree of the circuit court will be reversed and the cause remanded to that court, with directions to overrule the demurrer to the bill of complaint.

"*Reversed and remanded, with directions.*"

Upon such reasoning, the dismissal of the *Barsaloux* and like cases is correct. Neither the respondents nor any tax-payer has any equitable right or interest in this trust fund. Petitioners urge also the fact that the car-riders were not parties to those suits, nor were there pleadings nor any arguments in those cases to present their claims and interests in the fund. Petitioners now for the first time seek their day in court on this record, as the exclusive equitable owners of this car-riders-service fund.

In *People* v. *Chicago, Burlington and Quincy Railroad Co., supra*, at page 345 it is held:

"Where a right is asserted against a municipality and a judgment is recovered it is binding on tax-payers although they are required, as individuals, to pay the judgment, but a decree enjoining the collection of a tax to pay a demand against a town in a suit by tax-payers against the town is not *res judicata* against the holder of the demand who is not a party to the suit. (*Town of Lyons* v. *Cooledge*, 89 Ill. 529.) The interest of the holder of the demand is adverse to that of the

town and the taxpayers, and he is not represented by either in a litigation between them. This case does not come within any recognized rule of representation of one not a party to the record."

In the recent case of *Alward* v. *Borah,* 381 Ill. 134, the court quoted from the early case of *Botsford* v. *O'Connor,* 57 Ill. 72 at page 76 where it is said: "It is a principle that lies at the foundation of all jurisprudence in civilized countries, that a person must have an opportunity of being heard before a court can deprive such person of his rights. To proceed upon any other rule, would shock the sense of justice entertained by mankind, would work great wrong and injustice, and render the administration of justice a mere form. Until a person is made a party to a suit, and is afforded a reasonable opportunity of being heard in defense of his rights, a court has no power to divest him of a vested right." This rule has been reaffirmed many times. Your petitioners also rely upon *People* v. *Chicago, Burlington and Quincy Railroad Co.,* 247 Ill. 340, 345; *People* v. *Chicago and Alton Railroad Company,* 247 Ill. 373; *People* v. *Illinois Central Railroad Co.,* 298 Ill. 518, 521; *Town of Lyons* v. *Cooledge,* 89 Ill. 529; *Worley* v. *Idleman,* 285 Ill. 214, 221; and the note following the case of *Lee* v. *Independent School District* (149 Iowa, 345) as reported in 37 L. R. A. (N. S.) 383; *Leininger* v. *Reichle,* 317 Ill. 625; *Heppe* v. *Szczepanski,* 209 Ill. 88.

When the tax-payer is a member of the group who *contributed to the fund,* the tax-payer may complain and will be heard and allowed of right to control the fund. *City of Moline* v. *Greene,* 252 Ill. 275 at 280. It follows inevitably that your petitioners both AS CONTRIBUTORS TO THE COMMON FUND at bar, and as PATRONS AND CONSUMERS OF STREET CAR SERVICE that should have been purchased and provided with that fund, are proper plaintiffs to pursue this suit against unfaithful trustees.

And likewise you have decided recently in *Murdock* v. *Commonwealth of Pennsylvania,* 63 S. Ct. 870 at 875 and 876:

> "As stated by the Supreme Court of Illinois in a case involving this same sect and an ordinance similar to the present one, *a person cannot be compelled 'to purchase,* through a license fee or a license tax, *the privilege freely granted by the constitution.' Blue Island* v. *Kozul,* 379 Ill. 511, 519, 41 N. E. 2d 515, 519. * * *
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> "It is claimed, however, that the ultimate question in determining the constitutionality of this license tax is whether the state has given something for which it can ask a return. That principle has wide applicability. *State Tax Commission* v. *Aldrich,* 316 U. S. 174, 62 S. Ct. 1008, 86 L. Ed. 1358, 139 A.L.R. 1436, and cases cited. But it is quite irrelevant here. This tax is not a charge for the enjoyment of a privilege or benefit bestowed by the state. *The privilege in question exists apart from state authority. It is guaranteed the people by the federal constitution.*"

The right of your petitioners to pass over the highways and streets of Chicago freely as pedestrians or in any conveyance they choose to use is a national right guaranteed to them by the Constitution. See page 14 herein.

Record is unlike Police Power Cases.

This case is far removed from the parking meter cases and like rulings under the police power, such as *Andrews* v. *City of Marion,* 47 N. E. (2d) 968, 221 Ind. ....., and many citations there made. The limitations of maximum exercise of the police power are discussed in *Boston Elevated Ry. Co.* v. *Commonwealth,* 310 Mass. 528 at 556, (39 N. E. (2d) 87 at 109) as follows:

"However regulation of the use of the streets may be described, the principles, already stated, supporting the conclusion that the Legislature had power to grant the Atlantic Avenue location and to contract that it should be irrevocable, necessarily support the conclusion that such a grant cannot be revoked, under the guise of regulating the use of the streets, on the ground of expediency, in the interest of the general welfare. See *Grand Trunk Western Railway* v. *South Bend,* 227 U. S. 544, 553-557, 33 S. Ct. 303, 57 L. Ed. 633, 44 L.R.A., N.S., 405; *City of Owensboro* v. *Cumberland Telephone & Telegraph Co.,* 230 U. S. 58, 73, 74, 33 S. Ct. 988, 57 L. Ed. 1389. Compare *New Orleans Public Service, Inc.* v. *New Orleans,* 281 U. S. 682, 685, 686, 50 S. Ct. 449, 74 L. Ed. 1115. See also, *Commonwealth* v. *Strauss,* 191 Mass. 545, 550, 78 N. E. 136, 11 L.R.A., N.S., 968, 6 Ann. Cas. 842; *Smith* v. *New England Aircraft Co., Inc.,* 270 Mass. 511, 522, 523, 170 N. E. 385, 69 A.L.R. 300. 'A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions. * * * Under it there is no unrestricted authority to accomplish whatever the public may presently desire.' *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission,* 294 U. S. 613, 619-622, 55 S. Ct. 563, 566, 79 L. Ed. 1090. As was said by Mr. Justice Holmes, in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 413-416, 43 S. Ct. 158, 159, 67 L. Ed. 322, 28 A.L.R. 1321: 'As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. * * * *We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.*' "

Likewise we read in *Conway* v. *Cable*, 37 Ill. 82 at 90:

> "In all civilized governments, laws impairing the validity of contracts, and divesting the rights of property, are considered unjust and odious. And such enactments never receive such a construction, unless required by the language, when so plain as to admit of no other interpretation. In the case under consideration, the transaction was complete before the law was adopted, and the answer may have relied upon the defects, which are admitted to have existed, but are claimed to have been cured by the act of 22d February, 1861. To give it force, therefore would be to transfer the property of the former owner, not by force of a valid and binding sale for taxes, but by the declared will of the legislature, that his title should pass from him, and vest in the purchaser at a tax sale, which conferred no right. This the legislature have not the power to do, whether by direct and positive action, or by rendering valid and binding acts which were nugatory."

Confirmed by *Drainage District* v. *Soucy*, 292 Ill. 584, and by *City of Chicago* v. *Empire Liquidation Corporation*, 370 Ill. 631.

Error by Courts below is departure from decrees.

In *West Virginia State Board of Education* v. *Barnette*, 63 S. Ct. 1178 at 1184 and 1185: this Supreme Court recently has reaffirmed the constitutional guarantees as follows:

> "Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have

mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

"* * *

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

The foregoing accords with prior law of this case at bar shown at Tr. 138 ff.

Record proceeds at foot of Court decrees.

In the later ruling by this Court at the foot of a prior decree: *Schneiderman* v. *United States,* 63 S. Ct. 1333 at 1335 to 1358, your Honors said:

"We are dealing here with a court decree entered after an opportunity to be heard. At the time petitioner secured his certificate of citizenship from the federal district court for the Southern District of California notice of the filing of the naturalization petition was required to be given ninety days before the petition was acted on (Sec. 6 of the Act of 1906), the hearing on the petition was to take place in open court (Sec. 9), and the United States had the right to appear, to cross-examine petitioner and his witnesses,

to introduce evidence, and to oppose the petition (Sec. 11). In acting upon the petition the district court exercised the judicial power conferred by Article III of the Constitution, and the Government had the right to appeal from the decision granting naturalization. *Tutun* v. *United States,* 270 U. S. 568, 46 S. Ct. 425, 70 L. Ed. 738. The record before us does not reveal the circumstances under which petitioner was naturalized except that it took place in open court. We do not know whether or not the Government exercised its right to appear and to appeal. Whether it did or not, the hard fact remains that *we are here re-examining a judgment, and the rights solemnly conferred under it.*

"* * *

"Mr. Justice Douglas, concurring.

"Immediately we are concerned with only one man, William Schneiderman. Actually, though indirectly, the decision affects millions. If, seventeen years after a federal court adjudged him entitled to be a citizen, that judgment can be nullified and he can be stripped of this most precious right, by nothing more than re-examination upon the merits of the very facts the judgment established, no naturalized person's citizenship is or can be secure. If this can be done after that length of time, it can be done after thirty of fifty years. If it can be done for Schneiderman, it can be done for thousands or tens of thousands of others.

"The effect of cancellation is to nullify the judgment of admission. If it is a judgment, and no one disputes that it is, that quality in itself requires the burden of proof the court has held that Congress intended in order to overturn it. That it is a judgment, and one of at least a coordinate court, which the cancellation proceeding attacks and seeks to overthrow,

requires this much at least, that solemn decrees may not be lightly overturned and that citizens may not be deprived of their status merely because one judge views their political and other beliefs with a more critical eye or a different slant, however honestly and sincerely, than another. Beyond this we need not go now in decision. But we do not go beyond our function or usurp another tribunal's when we go this far."

The case at bar likewise is bottomed upon prior federal judgments and decrees (Tr. 136ff).

EXHIBIT "A"

Matters Collateral to this Litigation. Cases Before and During 1903 Street Railway Reorganization.

Guaranty Trust Co. v. *North Chicago St. Ry. Co.*, 130 Fed. 801.

Blair v. *City of Chicago*, 201 U. S. 400.

North Chicago St. Ry. Co. v. *Chicago Union Traction Co.*, 150 Fed. 612.

Guaranty Trust Co. of N. Y. v. *Chicago Union Traction Co.*, 158 Fed. 913, 158 Fed. 923.

Merchants Loan & Trust Co. v. *Chicago Rys. Co.*, 158 Fed. 923, 928.

City of Chicago v. *Chicago City Ry Co.*, 205 U. S. 549.

Venner v. *Chicago Rys. Co.*, 236 Ill. 349.

Cases Since Current Reorganization Began in 1926.

Chicago Rys. Co. v. *Ill. Commerce Commission*, 277 Fed. 970.

Thatcher v. *Chicago Rys. Co.*, 4 Fed. 2d 63, 297 Fed. 466.

Harris Trust & Sav. Bank v. *Chicago Rys. Co.*, 23 Fed. (2d) 192.

In Re Babcock, 26 Fed. 2d 153; 278 U. S. 615.
Harris Trust & Savings Bank, 39 Fed. (2d) 958.
City of Chicago v. *Harris Trust & Savings Bank*, 40 Fed. 2d 612.
Harris Trust & Sav. Bank v. *Chicago Rys. Co.*, 56 Fed. 2d 942.
Harris Trust & Sav. Bank v. *F. N. Bank and C. C. Ry. Co.*, 17 F. S. 181.
Re Chicago Railways Co., 17 F. S. 187.
Babcock v. *Chicago Rys. Co.*, 325 Ill. 16; 236 Ill. App. 360.

Conclusion for Relief.

Your petitioners submit that they did not receive *due process* of law nor *equal protection* of the law, in the Courts of Illinois in this case. The action of Circuit Court of Appeals was such as to call for review and reversal by the Supreme Court of the United States.

WHEREFORE, petitioners pray the allowance of a writ of certiorari to the Supreme Court of Illinois to the end that the cause herein may be reviewed and decided by this Court, and that the decree and orders herein by Circuit Court for Seventh Circuit may be reversed, and for such relief as this Court may direct.

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Counsel for Petitioners.